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MICHAEL RODAK, JR.

THE SUPREME COURT

of the

UNITED STATES

October Term, 1974

No. A-401

PHILIP A. CALABRESE, individually and as a Councilman and Mayor of Sand City, and FRANK ZABROWSKI, individually and as Chief of Police of Sand City, California,

Petitioners and Cross-Respondents

and

ELLIS POTTER, PEARL L. PENDERGAST, MARK MEADOWS and WILSON OLIVER, individually and as Councilmen of Sand City, California,

Additional Cross-Respondents,

vs.

PRESALEAN AVERY, personal representative of BRADY AVERY, deceased, and MELVIN WILLIAMS,

Respondents and Cross-Petitioners.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

The Memoradum of Decision of the District Court was dated October 13, 1972 and filed on October 15, 1972

(Pet. Ap p. I-XVIII). The Opinion of the Ninth District of the Court of Appeals is unreported (Pet. App. XIX-XXIII). Its order denying the Petition for Rehearing and rejecting the suggestion for rehearing en banc is similarly unreported (Pet. App. XXIV-XXV). A further unreported clarifying order appears as Pet. App. XXVI-XXVII).*

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1974. The two additional orders were entered on August 12 and August 26, 1974. Petition for Certiorari was dated November 7, 1974 invoking the jurisdiction of this Court under 28 USCA §1254 (1). By order of Mr. Justice Douglas the time of filing a Cross-Petition for a Writ of Certiorari was extended to and including January 8, 1975. This Cross-Petition is timely filed.

Council for Petitioners certified to the Clerk of the Court that ELLIS POTTER, PEARL L. PENDERGAST, MARK MEADOWS and WILSON OLIVER, "parties to the proceeding in the United States Court of Appeals for the Ninth Circuit have no interest in the outcome of the Petition for a Writ of Certiorari in this matter." However, the Cross-Petition for a Writ of Certiorari involves these four additional parties and therefore they appear in the

*Refers to Appendix attached to Petition for a Writ of Certiorari.

caption as additional Cross-Respondents.

QUESTIONS AS TO CROSS-PETITION

1. Did the trial court abuse its discretion by delaying determination of defendant's motion for a new trial from November 22, 1971 until October 16, 1972, which delay was well-nigh a year?

2. Did the trial court abuse its discretion by ruling in a civil rights case that there was no sufficient evidence to support the verdict of a unanimous jury even though the defendants made no motion for a directed verdict?

3. Did the trial court abuse its discretion by ruling that the climate of the trial was such that certain testimony of plaintiff Avery even though whenever objected to were ordered to be stricken, were sufficiently prejudicial to deprive defendants of a fair trial, even though defendants did not move for a mistrial?

4. Did the trial court demonstrate its prejudice against the plaintiffs and thus abuse its discretion by stating in his memorandum, sua sponte that it would have reduced the jury's award for compensatory damages from $42,000.00 to $3,000.00 for which reduction there is no basis in fact and there was no motion by the defendants for such reduction?

5. Is the abuse of discretion of the trial court granting a new trial to defendants so gross that the error becomes a matter of law?

STATEMENT

*BRADY AVERY (now deceased and is represented here by his surviving wife) and MELVIN WILLIAMS filed their Complaint under the Civil Rights Act (42 USC §§ 1982, 1983 and 1985) on April 9, 1969. They asked for an injunction against Petitioners and Cross-Respondents and also asked for damages for their auto-repair business in Sand City for lost finances due to discriminatory acts directed against them as blacks. Petitioners and Cross-Respondents were the Mayor and the Chief of Police respectively, additional Cross-Respondents are the four members of the Council of the city of Sand City. (CT-2)**

The Complaint charged that the Cross-Respondents entered into a conspiracy for the purpose of driving Cross-Petitioners out of their business and out of Sand City. They harassed them without any justification and finally they placed a no-parking sign before Cross-Petitioner's business, thus preventing the customers to patronize them (CT-2). Cross-Respondents succeeded and brought about a total destruction of Cross-Petitioners business. It was too late when the District Court issued an injunction restraining Cross-Respondents from enforcing the No-Parking ordinance, because by that time (May 23, 1969) Cross-Petitioners'

**CT refers to the Clerk's Transcript filed in the Court of Appeals.*

customers disappeared due to the harassment used against them by Cross-Respondents. (CT 15-16)

The issues were joined by Cross-Respondents having filed their Answer (CT-11) and the case was tried to a jury on November 1, 2, 3, 4 and 8th of 1971. The verdict was in favor of Cross-Petitioners for a total of $42,000.00 - each of the six (6) Cross-Respondents were assessed actual damages of $5,333.33 and punitive damages of $1,666.67. (CT 208-209)

On November 22, 1971, Cross-Respondents filed their Motion for a New Trial alleging:

a. Misconduct of the parties; of counsel and of the jurors.

b. Verdict is against weight of evidence; and,

c. Amount of verdict is not supported by evidence. (CT 126-127)

After Cross-Petitioners filed their opposition to a new trial the trial court, on April 26, 1972, vacated the "submission" of the motion for a new trial and ordered the parties to appear in court for a hearing to determine whether a new trial is to be granted on the ground of immunity of Cross-Respondents to suit. (CT 151-152)

On October 16, 1972 the trial court issued its Memorandum, (Pet. App. I-XVIII). Denying the motion for a new trial on the claimed grounds:

a. Misconduct of counsel; b. Immunity of Cross-Respondents; c. Misconduct of jurors. (CT 179-186)

However, new trial was granted on the ground of the alleged misconduct of the witness, i.e., Plaintiff AVERY. As to that the trial court stated (CT 188):

> *"The Court's assessment of the atmosphere at the instant trial prompts its conclusion that the order to the jury to disregard plaintiff Avery's challenged answers was not sufficient to prevent the intrusion of extraneous matters into the jury deliberations which might have been harmful to the defendants. It was apparent to everyone from the commencement of the trial that Avery was a highly partisan and highly volatile individual. His sometimes tumultous and inflammatory monologues were not erased by the admonition to the jury to disregard the inadvisable testimony. And accordingly, defendants' motion for a new trial on the ground of misconduct by a witness is granted." (CT 188)*

As to the insufficienfly of evidence to support the verdict, the trial court concluded thus:

> *"The clear weight of the evidence does not support plaintiffs' allegation that defendants Potter, Pendergast, Meadows, and Oliver*

either acted in bad faith in depriving plaintiffs of their constitutional rights, or conspired to effect such a deprivation. Accordingly, the motion of these defendants for a new trial is hereby GRANTED on this additional ground. Since the evidence was sufficient to support plaintiffs' allegations that defendants Calabrese and Zabrowski harassed them with the requisite intent or pursuant to the requisite conspiracy, the motions of these defendants for a new trial is hereby DENIED on this ground." (CT 190)

And, further:

"The evidence is not sufficient to support an award of damages as found by the jury. It is suspicious that plaintiffs were unable to locate the accounting books for their business years in which damages were claimed. The testimony of plaintiffs as to their damages strained the credulity of this Court. If a new trial did not have to be granted for Avery's misconduct, this Court would set aside the amount of the compensatory award and grant a new trial unless plaintiffs would have accepted $3,000.00 as a total award of compensatory damages. The punitive award would have been allowed to stand against Mayor Calabrese and Chief Zabrowski." (CT 190-191)

From the order of the trial court granting a new trial, Cross-Petitioners appealed to the Court of Appeals for the Ninth Circuit (CT 192, 193-194, 195). They presented the following "Questions Involved": Did the trial court:

1. Abuse its discretion by delaying the decision on the motion for a new trial from November 22, 1971 to October 16, 1972;

2. By ruling in absence of a motion for a directed verdict that the unanimous verdict of a jury in a civil rights case was not supported by sufficient evidence.

3. By ruling that the testimony of plaintiff AVERY created a climate which was sufficiently prejudicial to deprive the Cross-Respondents of a fair trial even though any testimony objected to were ordered to be stricken and even though Cross-Respondents never moved for a mistrial.

4. The appeal has urged prejudice of the trial court, shown by his sua sponte statement as to the propriety of remittitur if no new trial would have been granted, even though Cross-Respondents did not move for such a remittitur. Cross-Petitioners further appealed by alleging that the granting of a new trial was such a gross abuse of discretion that it became a matter of law.

The Court of Appeals found no merit in Cross-Petitioner's argments except as to the

propriety of a remittitur (Pet. App. XXIV-XXVII). Cross-Respondents filed their Petition for a Writ of Certiorari and Cross-Petitioners filed their within Opposition and also their Cross-Petition.

REASONS FOR GRANTING CROSS-PETITION

The decision of the Court of Appeals finding no abuse of discretion by the trial court, conflicts not only with the decisions of other Court of Appeals, but is contrary to every basic rule of law.

1. Cross-Petitioners argued in the Court of Appeals that the trial court abused its discretion when it postponed its decision on the motion for a new trial from November 22, 1971 to October 13, 1972, almost for a full year. In the absence of any federal rule they relied on Code of Civil Procedure § 660 of California which states that the trial court's power to rule on a motion for a new trial expires after sixty (60) days from the entry of judgment. The motion not ruled upon within such sixty (60) days, is deemed to be denied.

The thrust of Code of Civil Procedure § 660 is supported by the decision of this court in Jones v. Appel, 192 US 129, 24 S. Ct. 222, wherein it was held that a motion for a new trial shall be determined at the term at which the motion is made. The motion as in Code of Civil Procedure § 660 is treated as denied, if no ruling is forthcoming within the term.

The Court of Appeals dismissed Cross-Petitioner's argument by stating:

> *"The test is whether, considering all of the circumstances, the district court abused its discretion in taking the amount of time it did in deciding the issue. Applying this test, we cannot say that the time taken here was unreasonably prolonged in view of the difficulty of the issues." (Pet. App. XXI)*

The test applied by the Court of Appeals clearly incorrect in view of this court's decision in Jones, supra.

2. In ruling against Cross-Petitioners on the second of the "Questions Presented" stated:

> *"Without delving into the question of whether or not the District Court either had the power or abused its discretion in ordering a new trial on the grounds of insufficiency of the evidence as to verdict and award the damages absent a motion for directed verdict, [citing cases], we think that the court had the power to grant and did not abuse its discretion in granting the motion on the ground of Avery's misconduct." (Pet. App. XXII)*

The above is a total non sequitur and further the Court of Appeals ought not to avoid its prior holding by failing to "delve" into the issue.

One of the cases cited by the Court of Appeals was Oslund v. State Farm Insurance Company, 242 F.2d 813, 815 (9th Ct. 1957) the self same court said:

> *"The ground that there was not substantial evidence to support the jury's verdict or to allow the defenses to go to the jury is not before this Court. Appellant did not, at the close of the evidence or case, interpose a motion for a directed verdict, nor request that the defenses be excluded from consideration by the jury. This Court can only consider the question of sufficiency of the evidence when that has been made a question of law, and this can be done only by interposing a motion for a directed verdict at the close of all the evidence." (Emphasis added.)*

The Court of Appeals disregarded its own rule on the issue raised, as it disregarded the rule similarly established by the Second Circuit in Olivias v. American Export, etc., 431 F.2d 814, 816-817. It is contrary to the holding of the Sixth Circuit (Southern Railway v. Miller, 285 F.2d 202, 206); the ruling of the Fifth Circuit (Ponett v. Marshall, 283 F.2d 436, 438). It also disregarded Federal Rule of Civil Procedure, Rule 50, 28 U.S.C.A.

*3. The trial court granted a new trial because it found plaintiff AVERY to be an "impassioned witness" because he, before the jury, presented his case against Cross-Respondents and did so with conviction. Ought he be more forgiving? May be, but if he was not, that ought not justify a new trial following the unanimous verdict of the jury. (RT 1117)**

If AVERY was an "impassioned witness" he had good reason to be, since the evidence - believed by the jury - clearly has shown that Cross-Respondents, by their conspiratorial acts, destroyed their business in Sand City that provided their families with a fair livelihood. (RT 40-42, 83). Was AVERY to be less than "colorful" or even "impassioned" or even both, when the acts of the Cross-Respondents resulted not only in the destruction of their auto repair business, but in the loss of the AVERY home to boot. (RT 75-78, 91, 121-124, 151-152). Far more "colorful" or "impassioned" testimony was found no ground for a new trial. Cavness v. United States, 187 F.2d 719, which held that prejudice resulting from prejudicial testimony is mostly cured by striking it and instructing the jury to disregard it.

Here the attorney for Cross-Respondents was not even sure that he ought to object to the testimony of AVERY (RT 90, 95, 113, 121, 135, 155, 156, 169,

** Refers to Recorder's Transcript of the Court of Appeals (RT ___).*

188, 193). Whenever an objection was properly made, the trial court sustained it. However it is of great significance that counsel never moved for a mistrial, and in fact never moved that the testimony be stricken.

In Cavness, supra, the case of Fairmont Glass Works v. Cub Fork Co., 287 US 474, 53 S.Ct. 252, is cited to the effect that great weight should be given to the jury's ability to decide the case on the evidence. The District Court ought to have respected the judgment of the jury particularly because counsel for Cross-Respondents did not feel aggrieved by the testimony of AVERY to ask for a mistrial. The Court of Appeals for the Ninth Circuit in Everett v. Southern Pacific Co., 181 F.2d 58, held that allegedly improper statement by a witness, are waived by the party's failure to move for a mistrial.

4. The trial court was biased and prejudiced against Cross-Petitioners as it was shown when it found that the evidence is insufficient to support the verdict because:

> *"It is suspicious that plaintiffs were unable to locate the accounting books for the business years in which damages were claimed. The testimony of plaintiffs as to their damages strained the credulity of the Court." (Pet. App. XVII)*

The jury accepted the testimony of the three partners as to the loss of the books while in the hands of a bookeeping service. The Internal Revenue Service similarly accepted the explanation (RT 70-71, 125) however the trial court found the loss suspicious, as he did find incredible the damages claimed, even though the testimony remained uncontradicted that the business of Cross-Petitioners was totally destroyed and the testimony also showed that prior to the conspiracy of Cross-Respondents made a living-albeit not a princely one - from the business, by each of the three partners drawing weekly $125.00 to $175.00. (RT 15,40,42,83)

The trial court further showed its bias by stating that if a new trial would not have been granted on the ground of the alleged misconduct of plaintiff AVERY"...this court would set aside the amount of compensatory award and grant a new trial unless plaintiffs would have accepted $3,000.00 as a total award..." (RT 191) This statement was made the trial court sua sponte, Cross-Respondents never having moved for a remittitur. This presents "special circumstances" particularly in a civil rights case, requiring further review. Aetna Casualty v. Yeatts, 122 F.2d 350(4th Ct.); Daffinreed v. United States, 145 F.2d 724 (7th Ct.); Itzkoll v. Carlson, 151 F.2d 647 (2d Ct.).

5. Cross-Petitioners believe further review is required here because the abuse of the discretion of the trial court here was so gross that it became a matter of law.

The delay of the court to decide the motion for a new trial greatly prejudiced the Cross-Petitioners, particularly because AVERY is now dead and his testimony cannot be produced. Bias and prejudice is shown when the trial court permitted a new trial on the ground of prejudicial testimony of AVERY, one of the aggrieved parties and did so in absence of a motion for a mistrial.

Bias and prejudice is shown by dismissing the case against four (4) of the Cross-Respondents on the ground of insufficient evidence, when no motion for a directed verdict was ever made.

The bias and prejudice of the trial court must be equated as an error of law and thus further review is required.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari ought to be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit on the issues presented in this Cross-Petition.

Dated: December 31, 1974.

Respectfully submitted,

FRANCIS HEISLER
Counsel for Respondents and Cross-Petitioners

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

Cross-Petitioners have failed to show that special and important reasons exist to grant their petition. (Rule 19).

First, cross-petitioners claim the Court of Appeals should have reversed the district court's grant of a new trial, because the district court took twelve months (actually about nine months) to decide the motion. They rely on *James v. Appel*, 192 U.S. 129, 24 S.Ct. 222, 48 L.Ed. 377 (1904). *James v. Appel* did not involve the right of a federal judge to postpone decision of a new trial motion; it involved the application of Arizona territorial law in a territorial case.

Second, cross-petitioners claim the Court of Appeals should have reversed the district court's grant of a new trial, because the district court could not ground its decision on a finding the verdict was against the weight of the evidence, without a motion for directed verdict. However, the Court of Appeals was not required to consider the point, because it found that the misconduct of witness Avery, and the misconduct of three of the trial jurors, properly required a new trial. (App. to petition, pp. xxii, xxvii).

Third, cross-petitioners claim the Court of Appeals should have reversed the district court's grant of a new trial on the ground of misconduct of Avery, because there was no request for a mistrial. [Cross-Petitioners incorrectly state that counsel never requested the improper remarks be stricken. (App. to petition, p. xiii)]. Cross-Petitioners rely on *Carness*

v. United States, 187 F.2d 719 (9th Cir. 1951) and *Everett v. Southern Pacific Company*, 181 F.2d 58 (9th Cir. 1950) to support the proposition that a request for a mistrial is an absolute prerequisite to a new trial motion based on a witness's prejudicial remarks. However, there are decisions from the same circuit which rendered the decision below. Furthermore, *Carness* and *Everett* are distinguishable. Neitheir case involved the grant of a new trial without a request for mistrial. Instead, those cases involved denial of a new trial where, amongst other circumstances, there had been no request for mistrial. The lower court's exercise of discretion was upheld in each case. In the present case the Court of Appeals held, in effect, that a district court's discretion in these matters is so broad that it can grant a new trial although no request for mistrial was made. The court cited its decision in *Simpson v. Union Oil Company*, 411 F.2d 897, 908 (9th Cir. 1969), in which it had quoted from *Moist Cold Refrigerator Company v. Lou Johnson Company*, 249 F.2d 246, 256 (9th Cir. 1957), as follows:

> "But having permitted the jury to come to its conclusion on the facts, the trial judge then had the right, and indeed the duty, to weigh the evidence, as he saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in his conscientious opinion, the verdict is contrary to the weight of the evidence or based upon evidence which is false, or to prevent, in the sound discretion of the trial judge, a miscarriage of justice."

Fourth, cross-petitioners claim that the Court of Appeals should have reversed the district court's grant of a new trial, because the district court was biased against them, as shown by its comment that the amount of the verdict was unsupported by the evidence. One of cross-respondents' grounds for a new trial was that the amount of the verdict was against the weight of the evidence. (Cross-Petition, p. 5). Therefore, it was appropriate for the district court to comment on the size of the verdict.

Finally, the Court of Appeals in this case held that the misconduct of three trial jurors warranted a new trial. Cross-Petitioners do not challenge this holding.

CONCLUSION

For the foregoing reasons, the Court should deny the cross-petition for a writ of certiorari.

Respectfully submitted,

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and Cross-Respondents.

Dated, January 30, 1975.